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In the Supreme Court of the United States

(OCTOBER TERM, 1944)

No. 687

NUWAY LAUNDRY COMPANY,
a corporation,
Petitioner,

VERSUS

CHESTER BOWLES, Administrator Office of Price Administration,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND SUPPORTING BRIEF.

JOHN B. DUDLEY,
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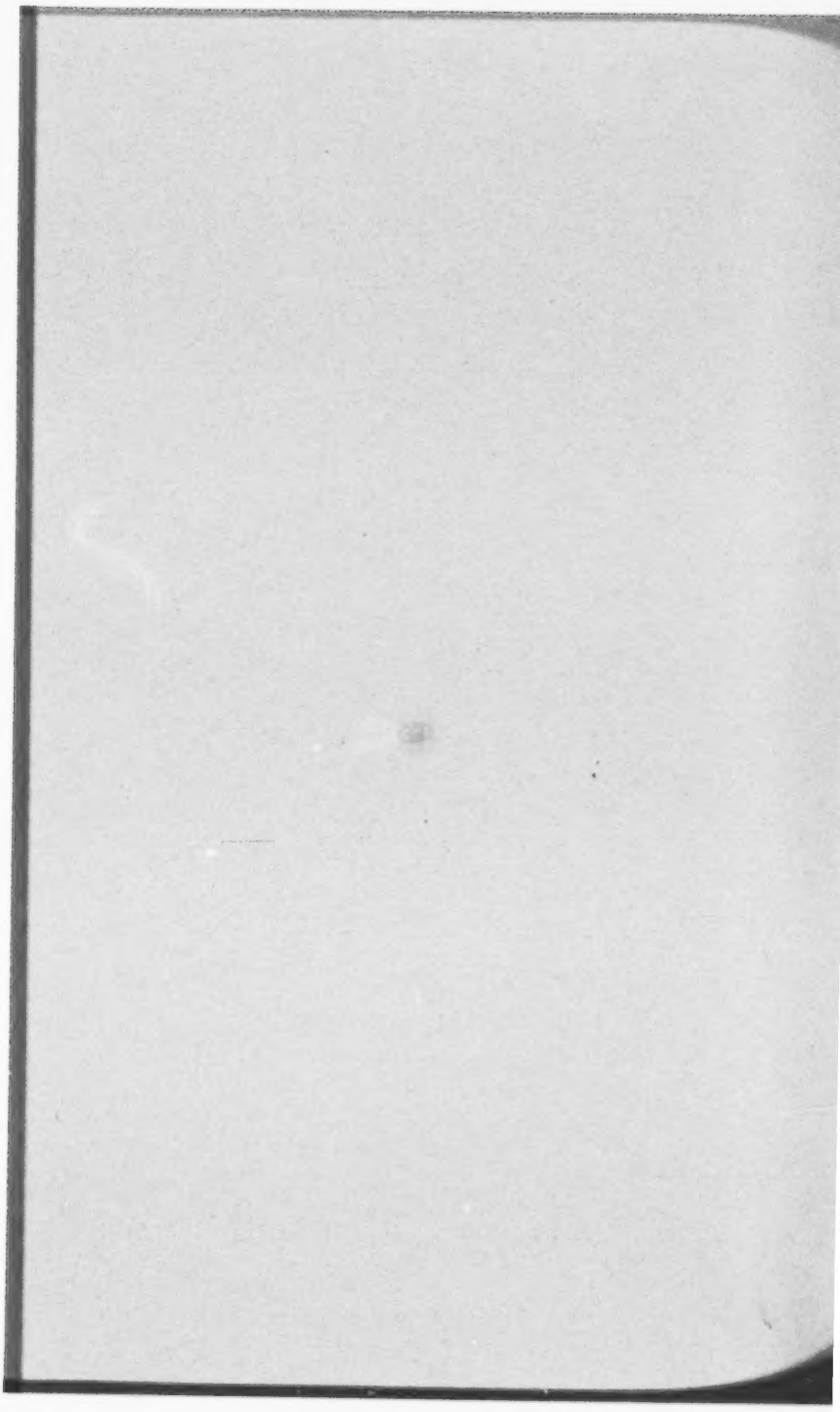
Of Counsel.

November, 1944.

UTTERBACK TYPESETTING CO., 13 S. Walker, Oklahoma City 4, Okla.



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PETITION FOR WRIT OF CERTIORARI

To the Honorable the Supreme Court of the United States:

The above-named petitioner respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

Under the Emergency Price Control Act of January 30, 1942, C. 26, 56 Stat. 23, 50 U. S. C. A. App. 901 *et seq.,* the Administrator, on April 28, 1942, issued General Maxi-

mum Price Regulation establishing maximum prices for commodities and services regulated thereby (7FR3153). Effective June 23, 1942, said Administrator promulgated Maximum Price Regulation No. 165 (7FR4734) as applied to laundry service, and these Regulations were in force at the time of the commencement of this action in the trial court (R. 2). The base period under said Maximum Price Regulation No. 165, as amended, is March, 1942. The petitioner was engaged in the laundry business in Oklahoma City, Oklahoma, during said base period and rendered the following separate and distinct services: Commercial Flatwork; Rental Linen; Budget Bundle; Fluff Dry Bundle; Wet Wash Bundle; Thrifty Bundle; and All Finish Bundle. During said period, and for about six months prior thereto, the petitioner gave a 20% discount to all Cash and Carry customers purchasing services requiring three days or longer to perform.

During said base period, and for many years prior thereto, the petitioner, as a business competition practice, sold its Commercial Flatwork service on a per pound basis ranging from 2¢ to 8¢. Between November, 1942, and March, 1943, it sold this service for a price per pound not exceeding 8¢ (R. 40).

During said base period, and for many years prior thereto, the petitioner, as a business competition practice, sold its Rental Linen napkin service on a per hundred basis ranging from 55¢ to 85¢; and as to Flatwork on a per pound basis ranging from 5¢ to 8¢. Between November, 1942, and March, 1943, it sold this service at an increased price

to some of its customers, but not exceeding the maximum price during said base period; that is to say, not more than 85¢ per hundred for napkins and 8¢ per pound for flatwork (R. 40).

During said base period the petitioner sold five separate and distinct bundle services:

(1) Budget Bundle — Completely Finished — Minimum, 12 pounds for $1.49. Over 12 pounds 9¢ per pound. Shirts finished 8¢ each additional.

(2) Fluff Dry Bundle—Flat Work all Finished—Minimum 9 pounds for 76¢. Over 9 pounds 7¢. Shirts finished 8¢ each additional.

(3) Wet Wash Bundle—Everything Returned Damp. Minimum 12 pounds for 49¢. Over 12 pounds 4¢. Shirts finished 10¢ each additional.

(4) Thrifty Bundle—Flat Work Finished, Wearing Apparel returned damp. Minimum 8 pounds for 49¢. Over 8 pounds 6¢ per pound. Shirts finished 8¢ each additional.

(5) All Finish Bundle—Everything Finished. Shirts Plain 10¢, 15¢, 20¢, 25¢. Shirts pleated 25¢. Shirts finished DeLuxe 25¢, Silk Shirts 35¢.

In each of the five types of bundle services above mentioned, the same character of service was performed in finishing shirts with collars and cuffs attached (R. 24-25).

On and after March 1, 1943, the petitioner increased the price for finishing shirts with collars and cuffs attached, laundered in connection with said bundle services, over the price charged in March, 1942, as follows:

Budget Bundle—Pound Price unchanged. Shirts finished increased from 8¢ to 12½¢.

Fluff Dry Bundle—Pound Price unchanged. Shirts finished each from 8¢ to 12½¢.

Wet Wash Bundle—Pound Price unchanged. Shirts finished each from 10¢ to 12½¢.

Thrifty Bundle—Pound Price unchanged. Shirts finished each from 8¢ to 12½¢.

All Finish Bundle—Discontinued the 10¢ price. All other prices remain the same (R. 25).

In July, 1943, the petitioner discontinued selling the Budget, Wet Wash and Thrifty Bundle services. In July, 1943, it also discontinued the finishing of shirts as a part of the Fluff Dry Bundle service at the same price it charged therefor in March, 1942; and thereupon it sold the service of finishing shirts with collars and cuffs attached only as a part of its All Finish Bundle service, and charged therefor a minimum of 15¢ for each shirt, and a maximum of 25¢ for plain and 35¢ for silk shirts. In this bundle service the petitioner made a separate charge for each article included in the bundle (R. 42-43).

During said base period, and for five or six months prior thereto, the petitioner allowed a discount of 20%

to all of its Cash and Carry customers on the price of all laundry services for the performance of which three days or longer were allowed. This cash discount was discontinued by the petitioner in November, 1942, because of increased operating costs and the shortage and excessive turnover of labor.

On March 3, 1943, the Administrator commenced an action in the District Court of the United States for the Western District of Oklahoma against the petitioner. The complaint appears in the record at pages 1 to 5. A violation of said Act, and the Regulations promulgated thereunder, is alleged and an injunction sought. A written stipulation was entered into and filed (R. 22-29). In addition to this stipulation P. O. DENHAM, an official of the petitioner, testified as a witness (R. 51-73). Upon this stipulation and the testimony of this witness Findings of Fact and Conclusions of Law were prepared and filed (R. 39-44). The trial court held that the petitioner acted in good faith, substantially complied with said Act and the Regulations promulgated thereunder, and denied the application for injunction. The Circuit Court on appeal reversed, in part, holding that the petitioner violated said Act and Regulations as to the Commercial Flatwork and Rental Linen services, the discontinuance of the 20% discount to its Cash and Carry customers and the partial discontinuance of the Fluff Dry Bundle service, and directed the issuance of a mandatory injunction.

II.

DECISIONS BELOW

The trial court filed an opinion on November 4, 1943 (R. 30-39), which is reported in 52 Fed. Supp. 498. The opinion of the Circuit Court of Appeals was filed August 28, 1944 (R. 77-88). It has not been officially reported. No petition for rehearing was filed by the appellant, the petitioner herein. On September 26, 1944, the appellee, the respondent herein, filed a petition for rehearing with supporting brief (R. 89-101). This petition was denied on October 7, 1944. On October 13, 1944, upon the application of the appellant, the petitioner herein, mandate was stayed for a period of thirty days from October 17, 1944 (R. 102).

III.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A. Sec. 347 (a).

IV.

QUESTIONS PRESENTED

The following questions are presented:

(1) During the base period the petitioner sold Commercial Flatwork service on a per pound basis ranging

from 2¢ to 8¢. Between November, 1942, and March, 1943, it sold this service for a price per pound not exceeding 8¢. Did this violate the Act and Regulations involved?

(2) During the base period the petitioner sold its Rental Linen napkin service on a per hundred basis ranging from 55¢ to 85¢; and from 5¢ to 8¢ per pound for Flatwork. Did this violate the Act and Regulations involved?

(3) During the base period the petitioner sold five separate and distinct bundle services, shirts being included in all. It discontinued three of these bundle services. It eliminated the laundering of shirts from the Fluff Dry Bundle service and thereafter laundered shirts only in the All Finish Bundle service. Did the elimination of the laundering of shirts in the Fluff Dry Bundle service and the laundering of shirts only in the All Finish Bundle service violate the Act and the Regulations involved?

(4) During the base period the petitioner allowed a discount of 20% to all of its Cash and Carry customers on the price of all laundry service for the performance of which three days or longer were allowed. It discontinued this discount in November, 1942, because of increased operating cost and the shortage and excessive turnover of labor. Did this violate said Act and the Regulations involved?

(5) Was the Administrator, upon the record, entitled to a mandatory injunction?

V.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The reasons upon which petitioner relies for the allowance of the writ are as follows:

(1) The Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court.

(2) The laundry industry is a sizeable one, and the services rendered affect the public generally. The Emergency Price Control Act is a war measure. This Act was amended by the Inflation Control Act of October 2, 1942 (C. 578, 56 Stat. 765, 50 U. S. C. A. App. Supp. 961, *et seq.*), and these statutory provisions and the Regulations promulgated thereunder involved herein should, on account of the industry as a whole and the interest of the public at large, be construed by this Court as applied to the laundry services presented by the record herein.

The Tenth Circuit, so far as our investigation goes, is the only Circuit dealing directly with the question presented here. This application is based upon the rule as applied to non-conflict cases, and this Court may, in its discretion, take jurisdiction. There were kindred questions presented and determined by the Third Circuit. [*Buckeye Parking Corporation* v. *Bowles, Price Administrator*, 141 Fed. (2d) 692].

WHEREFORE, It is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Tenth Circuit should be granted.

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DUDLEY, DUVALL & DUDLEY,
Of Counsel.

BRIEF IN SUPPORT OF PETITION

OPINIONS

The opinion of the trial court was filed on April 4, 1943 (R. 30-39), which is reported in 52 Fed. Supp. 498. The opinion of the Circuit Court of Appeals was filed August 28, 1944 (R. 77-88). It has not been officially reported. No petition for rehearing was filed by the appellant, the petitioner herein. On September 26, 1944, the appellee, the respondent herein, filed petition for rehearing with supporting brief (R. 89-101). This petition was denied on October 7, 1944 (R. 102).

JURISDICTION

Petitioner seeks a review, by certiorari, of the judgment of the United States Circuit Court of Appeals for the Tenth Circuit, of August 28, 1944, under the provisions of Section 240 (a) of the Judicial Code as amended. [28 U. S. C. A. 347 (a)].

STATEMENT OF THE CASE

The case was tried in the trial court upon a written stipulation and the testimony of an officer of the petitioner. Upon this stipulation and the testimony of this witness the trial court prepared and filed Findings of Fact and Conclusions of Law (R. 39-44). These Findings of Fact and Conclusions of Law, the complaint of the petitioner (R. 1-5), the opinion of the trial court (R. 30-39), the

opinion of the Circuit Court of Appeals (R. 77-88), and the foregoing petition, give a fairly complete and accurate statement of the case and we here adopt them as such.

SPECIFICATIONS OF ERROR

(1) The Circuit Court of Appeals erred in holding that the petitioner sold its Commercial Flatwork service, between November, 1942, and March, 1943, in violation of the Emergency Price Control Act, as amended, and the Regulations promulgated thereunder, involved herein.

(2) The Circuit Court of Appeals erred in holding that the petitioner sold its Rental Linen and Flatwork services, between November, 1942, and March, 1943, in violation of said Act, as amended, and the Regulations promulgated thereunder, involved herein.

(3) The Circuit Court of Appeals erred in holding that the petitioner violated said Act, as amended, and the Regulations promulgated thereunder, involved herein, by eliminating the laundering of shirts from the Fluff Dry Bundle service and thereafter including shirts only in the All Finish Bundle service.

(4) The Circuit Court of Appeals erred in holding that the petitioner violated said Act, as amended, and the Regulations promulgated thereunder, involved herein, by discontinuing its discount of 20% to its Cash and Carry customers.

(5) The Circuit Court of Appeals erred in directing the trial court to make and enter a mandatory injunction in accordance with its opinion.

SUMMARY OF THE ARGUMENT

POINT I.

The business practice of the petitioner during the base period as to its Commercial Flatwork and Rental Linen services was a legitimate one. It did not sell these services after said base period in excess of the maximum charge for such services during said period.

POINT II.

The petitioner had the right to discontinue the laundering of shirts as a part of its Fluff Dry Bundle service and thereafter launder them in its All Finish Bundle service.

POINT III.

The petitioner had the right to discontinue its 20% discount practice as to its Cash and Carry customers.

POINT IV.

The Circuit Court erred in directing the trial court to make and enter a mandatory injunction in accordance with its opinion.

POINT V.

The Circuit Court has decided an important question of Federal law which has not been but should be settled by this Court under the rule applicable to non-conflict cases.

ARGUMENT

Point I.

The business practice of the petitioner during the base period as to its commercial flatwork and rental linen services was a legitimate one. It did not sell these services after said base period in excess of the maximum charge for such services during said period.

The Findings of Fact, as applied to the Commercial Flatwork and Rental Linen services, are:

"III.

"During March, 1942, the defendant sold a laundry service known as commercial flatwork service, consisting of laundering towels, napkins, aprons, and kindred articles for doctors, restaurants, small hotels and similar commercial customers, at prices ranging from 2¢ to 8¢ per pound. Between November, 1942, and March, 1943, the defendant increased its prices for commercial flatwork to some of its customers and because of increased operating costs resulting in part from the shortage and excessive turnover of labor caused by defendant's being restricted as to the wages it can lawfully pay, is now charging some of its customers for said service prices in excess of the prices

charged the same customers for said service in March 1942, and prior thereto, but in no case has defendant charged any customer more than 8¢ per pound.

"IV.

"During March, 1942, the defendant sold a service known as Rental Linen Service, consisting of furnishing the use of towels, napkins, aprons and kindred articles owned by the defendant at prices ranging from 55¢ per hundred to 85¢ per hundred for napkins, and 5¢ per pound to 8¢ per pound for flatwork. Between November, 1942, and March, 1943, the defendant increased its prices for said service to some of its customers, and because of the increased cost of materials and increased operating costs, is now charging none of its customers for said service prices in excess of the prices charged the same customers for said service in March, 1942, and prior thereto, but in no case has defendant charged more than 85¢ per hundred for napkins, and 8¢ per pound for flatwork.

"V.

"The different prices to different customers for commercial flatwork service and rental linen service were made and fixed by the defendant in part to meet the competition of other laundries and in part to obtain or hold the patronage of customers, or to regain the patronage of customers who had ceased to patronize the defendant and were obtaining commercial flatwork and rental linen service from competitors of the defendant.

"VI.

"The different prices for commercial flatwork service and rental linen service to different customers were the result of competition of competing laundries.

"VII.

"The commercial flatwork service furnished to each and all of the customers was the same and identical service.

"VIII.

"Then rental line service furnished to each and all customers was the same and identical service" (R. 40-41).

Section 1499.102 of Maximum Price Regulation No. 165, as amended, in part, provides:

"Sec. 1499.102 Maximum Prices for Services: General Provisions. Except as otherwise provided in Maximum Price Regulation No. 165, as amended, the seller's maximum price for any service to which this Maximum Price Regulation No. 165, as amended, is applicable shall be:

"(a) The highest price charged during March, 1942 (as defined in this section) by the seller—

"(1) For the same service; or * * *"

* * * * * * * *

"(e) Similar services subsequently sold. Any maximum price determined under paragraphs (c) and (d) of this Section 1499.103 shall be the maximum price for all services subsequently sold by the seller which are the same as or similar to the service for which a maximum price has been so determined, without regard to subsequent changes in cost. * * *.

"For the purposes of this Maximum Price Regulation No. 165, as amended, the highest price charged by a seller during March, 1942, shall be:

"(1) The highest price which the seller charged for a service 'supplied' by him during March, 1942; or * * *.

"The 'highest price charged during March, 1942,' shall be the highest price charged by the seller during such month to a 'purchaser of the same class.'

* * * * * * * *

"No seller shall evade any of the provisions of this Maximum Price Regulation No. 165, as amended, by changing his customary allowances, discounts, or other price differentials."

Section 1499.116 (10) of said Maximum Price Regulation entitled "Definitions and Explanations, provides:

"'Purchasers of the same class' refers to the practice adopted by the seller in setting different prices for services for sales to different purchasers or kinds of purchasers (for example, wholesaler, jobber, retailer, government agency, public institution, individual consumer) or for purchasers located in different areas or for different quantities or grades or under different conditions of sale."

During the base period as applied to these services the petitioner charged some customers less than it charged others for the same service as a means of meeting competition. All of the customers of these services were purchasers of the same class of service, and the petitioner has not, under the record, sold these services to any customer in excess of the maximum price during the base period, and the holding of the Circuit Court to the contrary is fundamentally wrong, in our judgment. The holding is apparently based upon a construction of the Administrator

as to the meaning of the Regulations as applied to laundry services. The following is quoted from this interpretation:

> " 'If a laundry customarily charged two customers different prices at the same time the two customers are in a separate class even if one customer sometimes paid more than the other and sometimes less.' "

Following this quotation the Court said:

> "In other words, the test is not necessarily whether customers were purchasing the same service in the same area during the same period of time, but whether the said purchasers were paying the same prices for the same services during the base period. With this construction we are in accord, and it follows that when the appellee sold 'rental linen service' and 'commercial flat work' to a particular customer or customers at a particular price, it thereby created a class within the meaning of the Regulation (1499.102), and by that Regulation it is forbidden to charge this class of customer or customers in excess of the maximum prices charged that class during the base period. When judged by these standards the appellee had admittedly violated the Regulation in respect to the 'rental linen service' and 'commercial flat work' " (R. 86).

As we understand the opinion of the Circuit Court, as applied to Commercial Flatwork service a 2¢ per pound sale would create a 2¢ per pound purchaser; a 3¢ per pound sale would create a 3¢ per pound purchaser; a 4¢ per pound sale would create a 4¢ per pound purchaser; a 5¢ per pound sale would create a 5¢ per pound purchaser, and so on up to 8¢ per pound. In other words, there would be eight separate and distinct classes of purchasers

of this service and the petitioner could not charge any of them in excess of the base period price respectively paid by them. We submit that the petitioner may sell this service for any price per pound not exceeding 8¢.

About the time this case was brought in the trial court the Administrator brought another action therein entitled, *Prentiss M. Brown, Administrator Office of Price Administration* v. *Oklahoma Operating Company*, No. 1229 Civil. This case was tried before Judge Broaddus, and involved, among other things, the Commercial Flatwork service involved here, and as to this service he held:

> "3. Classes of purchasers as used in Maximum Price Regulation No. 165 as amended are not created by the defendant in granting different prices to different customers for Commercial Flat Work service.
>
> "4. The defendant by furnishing Commercial Flat Work service to different customers at different prices has not violated Maximum Price Regulation No. 165 as amended.
>
> "5. The granting of different prices for Commercial Flat Work service to different customers based upon competition for the same character of service does not under Maximum Price Regulation No. 165, as amended, create classes of purchasers."

The aboe case has not been reported in Federal Supplement but may be found in CCH, War Law Service, 1 Price Control Cases, page 51067, paragraph 50962. The rule announced is:

> "Establishment by a laundry of different prices for identical commercial flat work service rendered dif-

ferent customers does not create 'classes of purchasers' in violation of PR 165 (Services) where the different prices were made and fixed because of competition from other laundries, but the increase of prices for finishing shirts with attached collars and cuffs in certain 'bundle services' above the maximum price constitutes a creation of classes of purchasers in violation of the Regulation."

The Administrator appealed from the judgment in this case to the Circuit Court of Appeals, but the appeal was dismissed by him before the submission thereof.

The interpretation by the Administrator of the Regulations promulgated by him is entitled to much consideration, but is not controlling upon the courts. In *Davies Warehouse Company* v. *Chester Bowles, Price Administrator,* —— U. S. ——, 88 L. Ed. Advance Sheet No. 7, page 379, this Court announced this rule:

> "6. An administrative construction of a statute which was no sooner made than challenged does not command the deference of the courts."

What we have said under this Point as to the Commercial Flatwork service applies with equal force to the Rental Linen service, and we respectfully submit that the petitioner did not violate said Act as amended, and the Regulations involved, and that the holding of the Circuit Court upon this particular point is fundamentally wrong.

Point II.

The petitioner had the right to discontinue the laundering of shirts as a part of its fluff dry bundle service and thereafter launder them in its all finish bundle service.

In July, 1943, the petitioner discontinued selling the Budget, Wet Wash and Thrifty Bundle services, being three of its five bundle services. During said month it also discontinued the finishing of shirts as a part of the Fluff Dry Bundle service, and thereupon it sold the service of finishing shirts with collars and cuffs attached only as a part of its All Finish Bundle service, and charged therefor a minimum of 15¢ for each shirt, and a maximum of 25¢ for plain and 35¢ for silk shirts. Under its All Finish Bundle service during said base period its lowest price for plain shirts was 10¢ and its maximum price was 25¢. On and after March 1, 1943, petitioner discontinued its minimum price of 10¢ for shirts in said bundle service (R. 25).

Judge Vaught, the trial judge, in discussing this phase of the case, said:

> "The whole controversy seems to be over the prices now charged by the defendant for services sold in finishing shirts with collars and cuffs attached and the prices charged for bundle service in excess of the prices charged in March, 1942. It will be observed that the deefndant now sells such services on shirts only in the 'all finish bundle.' In the services sold in March, 1942, in the 'all finish bundle,' the prices that could be charged, under the defendant's schedule of prices for the identical service, for shirts ranged

from 10¢ to 25¢ per shirt. The evidence discloses that the price range now is from 17¢ to 18¢ per shirt. The highest or ceiling price has not been exceeded" (R. 37).

The petitioner had the right to discontinue the three above-mentioned bundle services and eliminate the service of finishing shirts from its Fluff Dry Bundle and include them in its All Finish Bundle, and by so doing did not violate said Act, as amended, and the Regulations promulgated thereunder.

Point III.

The petitioner had the right to discontinue its 20% discount practice as to its cash and carry customers.

During March, 1942, and for approximately five or six months prior thereto, the petitioner allowed a discount of 20% to all of its Cash and Carry customers on the price of all laundry services for the performance of which three days or longer were allowed. This cash discount was discontinued by the petitioner in November, 1942, because of increased operating costs and the shortage and excessive turnover of labor, and the said discount is not at this time allowed by the petitioner. (Finding of Fact XIX, R. 43; Stipulation XIII, R. 26).

Mr. Denham, the official of the petitioner, testified with reference to this discount (R. 59-61).

Section 4 (d) of the Act [50 U. S. C. A., Appendix, Section 904 (d)], under the heading "Prohibitions," provides:

> "Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent."

Under the above-quoted provision of said Act the aforesaid Finding of Fact and the evidence of Mr. Denham, the petitioner had the right, in our judgment, to discontinue this discount, and by so doing did not violate said Act, as amended, and the Regulations promulgated thereunder.

Point IV.

The Circuit Court erred in directing the trial court to make and enter a mandatory injunction in accordance with its opinion.

The provision of Section 205 (a) of the Emergency Price Control Act with reference to an injunction or other order is discretionary, and the judgment of the trial court denying an injunction was proper under the facts and circumstances presented by the record, in our judgment, and the Circuit Court erred in directing the trial court to enter a preliminary injunction.

—*Hecht Co.* v. *Bowles*, —— U. S. ——, 88 L. Ed. Advance Sheet No. 9, page 465.

Point V.

The Circuit Court has decided an important question of Federal law which has not been but should be settled by this Court under the rule applicable to non-conflict cases.

The Tenth Circuit is the only Circuit dealing with the questions involved here, and we do not have a case of conflict of decision, so far as our investigation goes. This Court has many times granted certiorari in non-conflict cases as applied to the construction of Federal Acts. We reiterate Paragraph V of the foregoing petition, and submit that under the rule as applied to non-conflict cases this Court should grant the petition.

Respectfully submitted,

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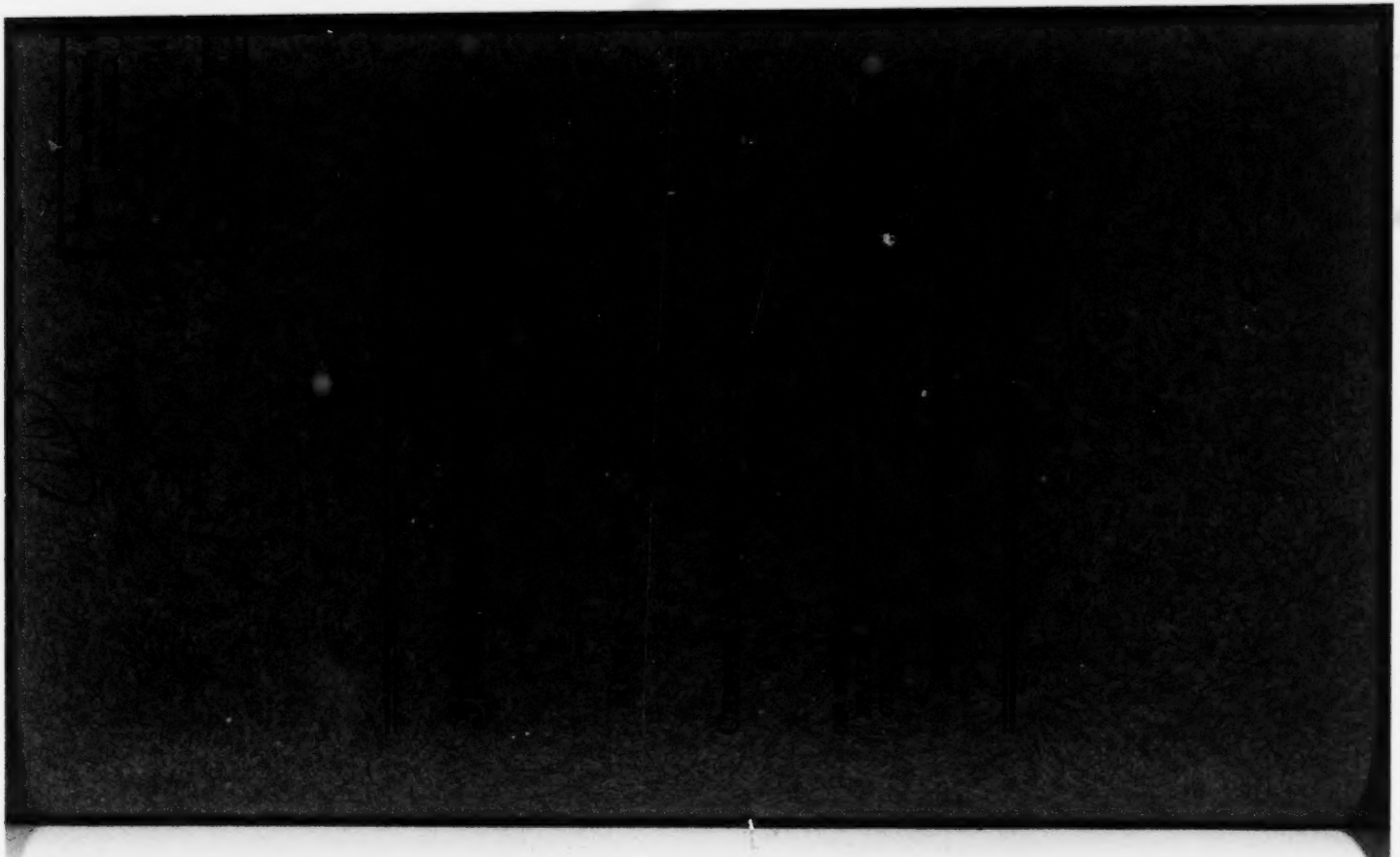
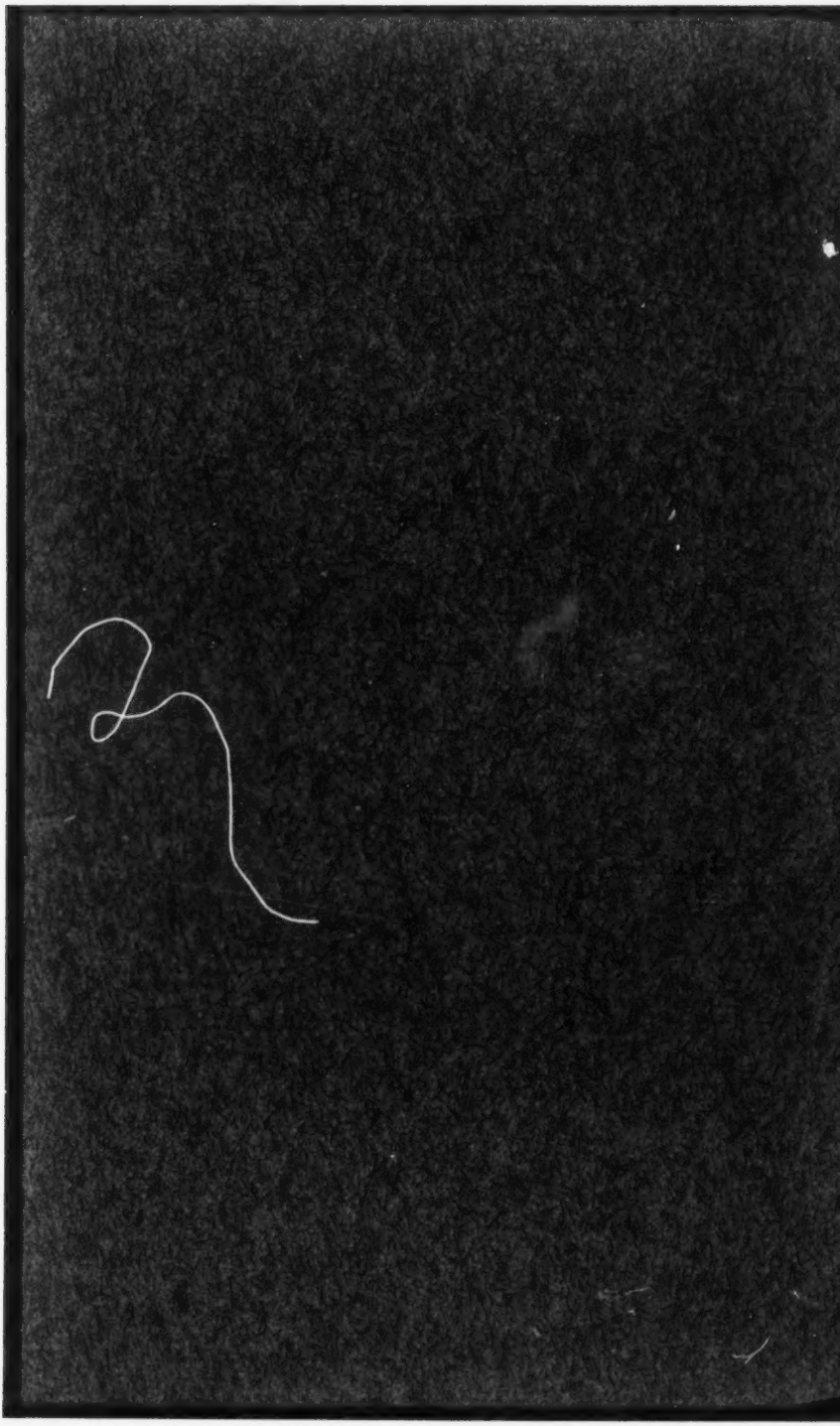
November, 1944.





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CITATIONS

621160—44

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 687

NUWAY LAUNDRY COMPANY, A CORPORATION,
PETITIONER

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District is reported in 52 F. Supp. 498. The opinion of the Circuit Court of Appeals for the Tenth Circuit is reported in 144 F. 2d 741.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 28, 1944 (R. 88). A petition for rehearing was denied on October 7, 1944 (R. 102). The petition for a writ of certiorari was filed in this Court on November 16, 1944.

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended (28 U. S. Code 347 (a)).

STATUTE AND REGULATIONS INVOLVED

The case involves the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. Code App. Supp. III, 901 et seq.) as amended by the Stabilization Act of 1942 (56 Stat. 765, 50 U. S. Code App. Supp. III, 961) and Maximum Price Regulation No. 165 (7 F. R. 4734 and 9 F. R. 7439). The pertinent provisions of the Act and of the Regulation are set forth in the Appendix, *infra*, pp. 10–12.

STATEMENT

Maximum Price Regulation No. 165, *infra*, p. 11, provides that no person shall sell a laundry service at a price higher than that which he charged for the same or similar service to "a purchaser of the same class" during the month of March 1942, and expressly prohibits the evasion of any of its provisions by changing customary allowances, discounts or other price differentials (Sec. 1499.101–102).

Petitioner, the operator of a laundry in Oklahoma City, in March 1942 sold five types of laundry services, designated as bundle services. (R. 24–25, 41.) It has discontinued the sale of all but two of these services, namely, an "all finished bundle service" and a "fluff dry bundle service". (R. 25, 42–43.) The "all finished" service con-

sists of laundering and returning completely finished and ready for use all of the articles in the bundle delivered by the customer. (R. 42.) The "fluff dry" service consisted of laundering the articles in the bundle delivered by the customer, and returning them washed and dried but not pressed or otherwise finished, except that shirts included in the bundle were completely finished in the same manner as shirts included in an "all finished" bundle. (R. 41, 42.) For shirts in a "fluff dry" bundle, petitioner in March 1942 charged 8 cents a shirt. (R. 41.) In March 1943 it increased this price to 12½ cents a shirt. (R. 42.) Since July 1943 it has purportedly discontinued laundering shirts as a part of its so-called "fluff dry" bundle service and since then has charged for laundering shirts, whether tendered with articles to be laundered "fluff dry" or otherwise, the price which it charged for laundering shirts in an "all finished" bundle, that is, from 15 to 25 cents for each plain shirt. (R. 43.)

Petitioner also sells two other services, designated respectively as a linen rental service, and commercial flatwork. For competitive reasons it followed a practice of charging different customers different prices for these services. Between November 1942 and March 1943 it increased the prices for each of these services to some of its customers and has since charged them higher prices than it charged them in March 1942 for the same services. (R. 40–41.)

In November 1942 petitioner discontinued a discount of 20% which in March 1942 and for several months prior thereto it had extended to its cash and carry customers. (R. 43.)

Alleging that by the discontinuance of the 20% discount and in effecting the several price increases above recited petitioner had violated the regulation, the Administrator brought this suit for an injunction to restrain petitioner from continuing to violate the Act and the Regulation. (R. 1–5.) The district court denied an injunction and dismissed the action. (R. 30–39, 44.) The circuit court of appeals reversed the judgment of dismissal and held that the discontinuance of the discount and the introduction of the several price increases constituted clear violations of the regulation. It directed the district court to issue an injunction restraining the petitioner from continuing the acts and practices which it found to be in violation of the regulation. (R. 77–88.)

QUESTIONS PRESENTED

1. Whether petitioner violated the applicable maximum price regulation—

(a) in increasing its prices to some of its customers for its linen rental and commercial flat work services over the prices which it charged the same customers in March 1942;

(b) in charging for laundering shirts tendered with laundry to be finished "fluff dry" more than it charged for laundering shirts so tendered in March 1942;

(c) in discontinuing a 20% discount which it had extended to its cash and carry customers in March 1942.

2. Whether the circuit court of appeals rightly directed the issuance of an injunction restraining petitioner from violating the regulation.

ARGUMENT

The decision of the court below is clearly right and not in conflict with that of any other circuit court of appeals, and no substantial reason exists for granting a writ of certiorari.

1. Contrary to petitioner's contention, the circuit court of appeals was right in holding that petitioner violated the regulation in increasing the price of its commercial flatwork linen rental services to some of its customers over the price which it charged them in March 1942. Petitioner in March 1942, for competitive reasons, followed an established practice of charging certain of its customers less than it charged its other customers. The regulation has at all times limited the price which any seller may charge for any service to the highest price charged by the seller for the same service during March 1942, "to a purchaser of the same class", and, until revised in July 1944, defined the term "purchaser of the same class" as referring to "the practice adopted by the seller in setting different prices for consumer services for sales to different purchasers or kinds of purchasers . . ." Section 1499.116(10). Constru-

ing these provisions, the Administrator on August 20, 1942, and September 22, 1942, respectively, issued the following official interpretations (OPA Service 11:968–969):

> Frequently, of course, a seller may have had the practice of giving a customer special low prices with the complete absence of any criteria which can be objectively applied. Thus a seller may have customarily given one customer—who by all objective tests was like many other customers—a special low price out of friendship, or habit, or whim, or because the particular customer was exceptionally good at haggling. In such a case, this buyer is in a saparate class by himself; his class was established by the seller's practice of giving him a lower price. OPA Service 11:968.)
>
> * * * Thus if a laundry customarily charged two customers different prices at the same time the two customers are in separate classes even if one customer sometimes paid more than the other and sometimes less. (OPA 11:969.)

Under this interpretation, petitioner plainly violated the regulation, and we do not understand petitioner to contend otherwise. Whether the interpretation is proper and whether the court below erred in following it are questions which are no longer of importance, because when the regulation was revised in July 1944 (9 F. R. 7439) the interpretation was embodied in the regulation

itself. The definition of the term "purchaser of the same class" now reads:

> "Purchaser of the same class" means a purchaser belonging to the same price class, that is, to a group of purchasers to whom it was your established practice in March 1942 to supply or offer to supply the same service at a particular price. If in March 1942 you customarily supplied or offered to supply the same service to any purchaser at a price different from the price at which you supplied or offered to supply the same service to all other purchasers, that purchaser is in a price class by himself.

Since this is a suit for an injunction which operates wholly *in futuro*, applicable to a continuing course of action, the revised regulation controls its disposition. *Texas Company* v. *Brown*, 258 U. S. 466; *Standard Oil Company* v. *Angle*, 128 F. 2d 728 (C. C. A. 5th). Under the regulation as revised, the decision of the circuit court of appeals is not open to question.

2. There is no merit in petitioner's contention that the court erred in holding that petitioner's alleged discontinuance of the laundering of shirts as a part of the "fluff dry" bundle service constituted a violation of the regulation. Petitioner is still, as in March 1942, laundering shirts and is still accepting laundry, without shirts, to be finished "fluff dry". During March 1942, as at present, shirts were processed separately from the

laundry to be finished "fluff dry". In fact, petitioner's general manager testified that all shirts were run through the same shirt line (R. 52). But in March 1942 petitioner charged only 8 cents to launder a shirt if tendered with laundry to be finished "fluff dry", whereas today it is charging more than twice that amount for a shirt similarly tendered. Petitioner's statement that it has discontinued laundering shirts as a part of its "fluff dry" bundle service and is laundering shirts only as a part of its "all finished" bundle is, therefore, merely another way of saying that it has increased its price for laundering shirts tendered with other laundry to be finished "fluff dry". Price increases are forbidden by the regulation, whatever may be the formula used to describe them.

3. The circuit court of appeals was also clearly right in holding that petitioner had violated the regulation in discontinuing the 20% cash and carry discount. In view of the express provision in the regulation prohibiting changes in customary allowances and discounts extended in March, 1942, the court could not have reached any other conclusion. By no stretch of imagination can Section 4 (d) of the Act (Pet. p. 22) be said to authorize the discontinuance of the discount. That section merely provides that nothing in the Act shall be construed to require any person to sell a commodity or to offer any accommodations for

rent. It plainly has no bearing whatever on the case.

4. Petitioner not only flagrantly violated the regulation but vigorously defended its right to do in the future what it had done in the past. In these circumstances injunctive relief was clearly called for and the trial court erred in denying it. Cf. *Walling* v. *Helmerich & Payne, Inc.*, (No. 27, October Term, 1944, decided Nov. 6, 1944). The circuit court of appeals rightly directed that an injunction issue.

CONCLUSION

The decision is correct; there is no conflict, and no question of substance is presented. The petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

THOMAS I. EMERSON,
Deputy Administrator for Enforcement,
DAVID LONDON,
Chief, Appellate Branch,
Office of Price Administration.

DECEMBER 1944.

APPENDIX

Section 4 (a) of the Act (50 U. S. Code App. 904 (a) reads as follows:

> It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) of section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

Section 205 (a) (50 U. S. Code App. 925 (a)) of the Act, reads as follows:

> Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provisions of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order,

or other order shall be granted without bond.

Maximum Price Regulation No. 165 as amended 7 F. R. 6428:

§ 1499.101 *Prohibition against dealing in services above maximum prices.*—On and after July 1, 1942, regardless of any contract or other obligation:

(a) *Sales.*—No "person" shall "sell" or supply any of the "services" set forth in paragraph (c) of this section at a price higher than the maximum price permitted by this Maximum Price Regulation No. 165 as amended.

* * * * *

(c) *Services covered.*—This Maximum Price Regulation No. 165 as amended shall apply to all rates and charges for the following services, except when such services are rendered as an employee:

* * * * *

(36) Laundering (including but not limited to laundry collection and including also but not limited to diaper, linen, towel, uniform or work clothes supply service, with or without laundering).

§ 1499.102 *Maximum Prices for Services; General Provisions.*—Except as otherwise provided in Maximum Price Regulation No. 165, as amended, the seller's maximum price for any service to which this Maximum Price Regulation No. 165, as amended, is applicable shall be:

(a) The highest price charged during March 1942 (as defined in this section) by the seller—

(1) For the same service; or

(2) If no charge was made for the same service, for the similar service most nearly like it;

* * * * *

For the purposes of this Maximum Price Regulation No. 165, as amended, the highest price charged by a seller during March 1942 shall be:

(1) The highest price which the seller charged for a service "supplied" by him during March 1942; or

(2) If the seller supplied no such service during March 1942, his highest "offering price" for supply during that month:

The "highest price charged during March 1942" shall be the highest price charged by the seller during such month to a "purchaser of the same class."

* * * * *

No seller shall evade any of the provisions of this Maximum Price Regulation No. 165, as amended, by changing his customary allowances, discounts, or other price differentials.

§ 1499.116 *Definitions and explanations.*—(a) When used in Maximum Price Regulation No. 165, as amended:

(10) "Purchaser of the same class" refers to the practice adopted by the seller in setting different prices for services for sales to different purchasers or kinds of purchasers (for example, wholesaler, jobber, retailer, government agency, public institution, individual customer) or for purchasers located in different areas or for different quantities or grades or under different conditions of sale.

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